GRAY (L.C.)

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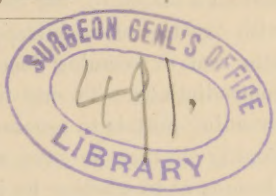

SUGGESTIONS FOR A NEW METHOD OF TAKING EXPERT TESTIMONY.*

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No one will venture to deny that the present method of taking the testimony of medical experts is unsatisfactory, for judges, lawyers, and jurymen regard these gentlemen with distrust, and medical men, as a rule, are very reluctant to go on the witness stand. To us physicians the reason for all this is perfectly obvious. The machinery of the law is not adequate for the purpose of obtaining for judges and juries the opinion of competent medical men. One of the latter, for example, who is to give his opinion to a jury upon a great question of medical science goes upon the witness stand in a radically false position at the very start, since he is regarded by everybody as a partisan, this opinion often being held most strenuously by the lawyers who have retained him. His successful passage through the cross-examination to which he will be subjected is generally dependent much more, I am sorry to say, upon his quickness of wit and repartee than upon his knowledge of medicine, as he is

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seldom a match for the trained disputants of the law, facile with experience in entrapping the unwary or the confused into real or seeming inconsistencies and apparent verbal contradictions. Twenty-four listening ears in the jury box, sounding portals to ignorant and untrained brains, drink in eagerly all that he says, and the jurymen reach their conclusions as to whether he is trustworthy or not much more upon the data furnished by his personal address, his coolness, and his adroitness, than through any exposition that he may offer them of the facts of science. Then comes the expert upon the other side to contradict him, for he must contradict him or he will be regarded as disloyal to those who are to pay him his fee. It constantly happens that a competent physician thus has his conclusions rejected by an incompetent one. Who is to decide between them? The theory of the law is that the lawyer of the competent witness should make the competency of the latter apparent, and that he should make equally clear the ignorance or the false conclusions of the incompetent witness. But any man familiar with our trials knows that this is very rarely done, for the very simple reason that the lawyer himself seldom has a sufficient knowledge of medicine to do this; so that between the theory and the practice there is so wide a divergence that in very few trials of this kind does it happen that an entirely incompetent man does not obtain as much credence with the jury as an entirely competent one. I have myself been present at many trials in which some acknowledged master of the art and science of medicine has been counterbalanced in the minds of the jury by some medical man who would not have been fit to act as his third or fourth assistant. Lawyers will say that this difference between the two men can be made plain to the jury. Theoretically this is so, but in practice how is it to be done? One way would be to ask the opinion of the com-

petent man about the incompetent one, but if this is attempted a cry of professional jealousy is raised by the opposing lawyer, generally with deadly effect. Another way is to call in other medical men to testify as to the competency of the two men, but such testimony is difficult to obtain, because physicians are very reluctant to appear in such an invidious position, and, moreover, the testimony of six men against a man can almost always be offset by the testimony of six other men for him, provided the attorney of the latter is energetic enough. A third way is to show the incompetency of the incompetent man by a rigid cross-examination; but this will depend upon the cross-examining lawyer's knowledge of medicine, which, as I have already said, is generally an unknown factor, and frequently none at all. Then, too, the reporters in the court room, on the alert for what is piquant and sensational, blazon forth to the public garbled reports of what the competent man has said, which are in no wise offset by equally faulty sketches of what the incompetent man has said, inasmuch as the latter has no particular reputation to lose and is therefore not vulnerable in this regard. The result of this system of obtaining medical testimony is that the competent physician goes home feeling that he has not been properly protected or reported, so that he shuns the next trial, and comes to believe that such leveling processes are too dangerous to his reputation to be often repeated. The lawyer ought to be able to appreciate these feelings very well. He takes precious good care that no question of legal science is passed upon by a jury. Ah, no! He puts his questions of legal science in the first place before a judge trained and educated in legal lore, and generally with an experience of years in a judicial capacity. Then, if he is not satisfied with this judge's decision, he brings the matter before the General Term, we will say, three judges sitting in a row, generally of still higher

standing at the bar than the first judge. Still again, if he feels discontented, he goes before the Court of Appeals, a bench of judges generally of yet higher training; and if the question be one of the proper kind he may pass on to the Supreme Court of the United States. Yet we physicians are expected to be content with the haphazard conclusions passed upon our great questions of medical science by a body of twelve men taken from the body of the people, often illiterate, invariably ignorant even of the elements of science, and still more crassly ignorant of the great principles innate to the higher and intricate questions of our profession that are taught only to the ablest men after a decade or two of close application and wide experience. The history of our courts records many failures of justice in determining medical questions under our present system. I could keep you here many hours if I were to go into the details of all that have occurred in the last twenty years. Is there a man in this room to-night who believes that Guiteau was not insane? Yet he was hanged in the sight of the world as a sane man; and the mockery of justice was made apparent beyond cavil by the autopsy, which brought to view his distorted brain with its wasted convolutions and its diseased membranes, mute testimonials to the accuracy of conclusion of the few courageous scientists who had dared to stand up against the howling mob of medical politicians and tell the truth. Some of you may remember the contest in the northern part of this State, some ten or twelve years ago, over the will of the wife of an ex-President whose lunacy at the time of making the will was so conclusively established that not a medical witness could be found to take the stand and say that she was not insane; and yet the surrogate admitted the will to probate, and a beautiful city on the border of one of our western lakes is now cultivating art and aiding religion with money that

rightfully belonged to the heirs of the testatrix. We all know that a year ago twelve jurymen and a judge undertook to decide the mental condition of a prominent banker in this city, the world-wide reputation of whose father had made him conspicuous, and that after two weeks of the most careful elucidation of the questions at issue the judge did not deem the jury competent to decide, confessed his own inability to do so, and relegated the whole question to a medical superintendent in the northern part of the State, who, although entirely able, was not one whit more so than several physicians who testified at the trial, while his selection was a virtual confession of utter impotence in the legal machinery of the trial court.

How these defects in the law are to be remedied has been to me occasion for much thought, as well as many conferences with legal friends in whose judgment I have confidence. At the outset the keynote of the situation seems to me to be contained in Julius Cæsar's remark, who, when he was asked why he divorced his wife Pompeia when he had stated his disbelief that she was any party to the plot of the profligate Clodius to obtain an entrance to her house when she was alone with her women during the festival of the Good Goddess, answered haughtily: "Cæsar's wife must be above suspicion!" So must the medical expert be. He goes into the court now as a partisan. He should be there as a judge. There are two methods, in my opinion, by which this object can be effected:

First, the selection of medical men by the presiding judge to sit on the bench with him in an advisory capacity in trials which do not need juries.

Second, a conference of all the medical men in cases tried by a jury.

In England, I am told, it is the custom for the judge in admiralty cases to select a certain number of retired naval

officers, called *assessors*, who sit with him upon the bench and advise him in regard to nautical matters. I see no reason why such a custom should not be introduced here in trials before a judge. The latter can always ascertain who the competent men are in the different branches of medicine, either by consulting two or three physicians of character and standing, which is generally well known in the lesser towns, or, in a large city like New York, by a letter addressed to the president of some such body as our Medical Society of the County of New York or our Academy of Medicine, which elects a new presiding officer every year or every few years, and which is therefore reasonably sure to be free from cliquism. In jury trials a conference of the medical experts has been the custom for some time in Leeds, England, and of it Sir James Fitzjames Stephen, Judge of the High Court of Justice, Queen's Bench Division, writes thus in his *History of the Criminal Law of England*, published in 1883: "For many years this course has been invariably pursued by all the most eminent physicians and surgeons in Leeds, and the result is that in trials at Leeds (where actions for injuries and railway accidents and the like are very common) the medical witnesses are hardly ever cross-examined at all, and it is by no means uncommon for them to be called on one side only. Such a practice," he goes on to say, "of course implies a high standard of honor and professional knowledge on the part of the witnesses employed to give evidence; but this is a matter for medical men. If they steadily refuse to act as counsel, and insist on knowing what is to be said on both sides before they testify, they need not fear cross-examination." These pithy words sum up the whole matter. Such a conference of the medical witnesses was suggested, as many of you will remember, some four years ago before this society by our distinguished fellow-member, the Hon. Willard Bartlett, who informs me that a

number of cases have been tried before him under this system with the most admirable results. The medical men who go into such a conference must agree upon the facts. No one of them, for instance, unless he is exceptionally pachydermatous and unscrupulous, would deny the existence of a wasted muscle which the others saw, or a paralyzed limb, a lack of feeling of the prick of a pin, a tremor, a broken vertebra, a fractured bone, a contracted or dilated pupil, or any of the other objective evidences of disease whose recognition constitutes the very primer of a physician's education. Even if one unscrupulous physician is shameless enough to deny that he has seen what the others have, his testimony will be worthless, because it would be contradicted by honest medical men testifying upon the same side of the case. The conferring physicians can therefore only differ in the conclusions which they may draw from what they have seen, and this would simplify the trial very greatly, because it is far easier to judge of the value of conclusions when the facts are admitted than it is to do so when the facts themselves are in doubt. Suppose, for example, that six physicians in conference admit that a man has been injured in a railway accident so that his spinal column is fractured and his lower limbs are completely paralyzed. Suppose that three of these physicians state their belief that the man will never recover, while the other three are equally positive that he will get perfectly well. All that the lawyers have to do is to bring into court medical books treating of such fractures and their consequences, collect the statistics, and conclusively prove that one or the other side must be mistaken. Some one may object that even the medical writers upon this subject will not be unanimous in their conclusions. Admit that this is so, even then it is perfectly feasible to compute an average and hence arrive at what the law calls a reasonable certainty.

The popular belief in the uncertainty of medical science is a popular error. Medicine to-day is, in many of its departments, one of the exact sciences. It is a remarkable tribute to his mental breadth that a man who has been so engrossed as Lord Salisbury has been in the varied and pressing demands of a leader of a great party in a vast empire should have recognized this fact as he has in a recent address at Oxford. I do not believe that six competent physicians in the city of New York would be at variance in any essential particulars in their recognition of the condition of a given patient. During the last winter it has been my fortune to have a consultation with eight neurologists about a certain patient in this city, and my diagnosis was agreed to by every one; nor was there any essential difference in the treatment advocated. For fourteen years a brother specialist of mine, now sitting in this room and known to you all, has upon many different occasions been engaged in the same expert trials in which I have been concerned, and during this long period of time there has never been a disagreement between us, as to either diagnosis or treatment, except in one case, where we agreed upon the facts but differed in our conclusions—this, too, although we have fully half the time been upon opposite sides. The truth of the matter is that medicine has, to a very large degree, emerged from its empirical period and passed into one of approximate certainty. The attitudinizing, pompous physician of the past—solemn, white-cravated, eking out his dignity with a gold cane, and looking unutterably wise—has given place to the scientist; just as the rollicking, swaggering sailor of the olden time, gay of mien and jolly of air, profuse with his oaths and equally prodigal of his money, has made way for the educated engineer, thoroughly trained in the mechanism of the intricate machinery of our modern ironclad and torpedo boat. That the popu-

lar error remains rooted is due to the lack of appreciation by the laity, and even by judges and lawyers, that medicine is now so vast a science that a man who may be an authority in one department of it may be an utter novice in another. There are now published each year in the civilized world over two thousand medical journals and hospital reports. Almost every large capital in the world has two or three weekly journals. Every large city has several that are issued each month, besides which there are a vast number published every quarter. There is now being published in Paris an *Annual of the Universal Medical Sciences*, an American enterprise, which for five years past has been published in Philadelphia, filling each year five octavo volumes, and containing only an abstract of the noteworthy publications during the year. Each department of medical and surgical science is edited by some distinguished man, to whom the editors send clippings of the articles pertinent to his branch. During the last year this *Annual* quoted from two thousand one hundred and sixty-six different medical publications. There are ten great departments of modern medicine: General medicine, embracing what is known as general practice, such as abdominal and thoracic diseases, the general fevers, and the so-called zymotic diseases; general surgery; eye and ear diseases; laryngology, or diseases of the nasal and throat passages; neurology, or diseases of the mind and nervous system; dermatology, or diseases of the skin; genito-urinary surgery, with which is generally included venereal diseases; diseases of women; orthopædic surgery, or diseases of the joints; sanitation and hygiene; and in the larger cities there are also specialists restricting themselves to the diseases of childhood. Although each one of these specialists must undergo a general training of years in the medical schools and hospitals in the anatomy and physiology of the

human body, the varieties and properties of drugs, and the general way in which disease affects the body, and although in the less populated districts there is not sufficient population to warrant the growth of the physician beyond the stage of the general practitioner, yet in our great cities these ten great specialties are almost as distinct from one another as the dentist is from the physician, or the lawyer from the physician, or the shoemaker from the tailor, or the carpenter from the plumber. In none of these specialties does any man to-day obtain a great reputation until he has been from ten to twenty years in actual practice, and the most capable of minds can seldom master the technique of any one of them under a decade. So thoroughly is this fact recognized by the profession at large that no specialist in one line would venture for a moment to pit his opinion against that of a specialist in another. Each specialty has its own society in the city of New York, often in lesser cities, and also a national society. There is in this country a congress of physicians and surgeons which meets every three years in Washington, composed of fourteen different special societies. Considering all these facts, it is evident that such a system as I have advocated to-night can never work adequately unless the medical advisers to a court are selected with careful regard to their fitness for dealing with the matter at issue. The selection by a judge of his family physician to pass upon a question of women's disease, orthopædic surgery, neurology, etc., would not be a proper selection; for however able the family physician might have shown himself in dealing with the sicknesses of a family, and however great his natural ability might be, he would probably himself be the first to ask for a consultation with a specialist in any dangerous case outside of his line of general practice.

It is intimated to me by some of my legal friends that

the system of medical assessors and conferences which I have proposed will be open to the objection that it is opposed to the principles of our law. To this I make answer that, if this be the case, the principles of our law are radically faulty. We are confronted with a condition of things which has grown out of our modern civilization, and which was not contemplated by our earlier law-makers. Are we to so blindly venerate the memory of our bygone jurists as to credit them with omniscience, and stand hopelessly shackled in the face of miscarriages of justice? Lord Coke said that the common law was the perfection of reason. In his recent interesting article upon the Chicago anarchists Judge Gary modernizes this into: "The common law is common sense." Certainly it seems to me, although I am no lawyer, that a law that ceases to be the embodiment of common sense has outlived its usefulness and ought to be superseded. No principles should stand in the way of necessary remedial measures.

I therefore ask the sober consideration of this society of my two suggestions—namely, first, the selection of medical men by the presiding judge to sit on the bench with him in an advisory capacity in trials which do not need juries; second, a conference of all the medical men in cases tried by a jury.

If the society will coincide with me in the advisability of these two remedial measures, I will ask for the appointment by the presiding officer of a proper committee to deliberate upon the matter and secure necessary legal enactments.

REASONS WHY

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